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No. 84-322

IN THE

Supreme Court of the United States

October Term 1984

CHARLES G. REMINICK, HERBERT M. BRITTON, BERNARD SPEAR, and PETER BLITZER, individually and doing business as REMINICK, AARONS & COMPANY,

Petitioners,

—against—

JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON, MELVIN KRAUSS and JOSEPH BINENBAUM,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents' Brief apparently concedes that ERISA allows a subrogated surety or fidelity insuror to bring an action for breach of fiduciary duty. Respondents maintain, however, that such claims must be brought in federal court. Respondents further claim the Petitioners' third-party action must be brought in federal court. Respondents' Brief p. 15.

Respondents also claim incorrectly that the Petitioner have removed the instant action to federal court. The Petitioners served upon Respondents' counsel a petition for removal, but did not proceed to petition the court. Instead the Petitioners have notified the parties that they would not at this time seek to remove the instant action. The Petitioners intend instead to consolidate the instant action with certain newly discovered state court actions.

Respondents' position that subrogated surety and fidelity insurors' and the Petitioners' claims should be brought in federal court is incorrect for several reasons. There is presently pending in the Supreme Court of the State of New York, New York County a consolidated action entitled as follows:

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION, *Plaintiffs,*	**Index No.: 7306/80**
-against-	**ACTION #1**
MANUFACTURERS HANOVER TRUST COMPANY, *Defendant.*	

MANUFACTURERS HANOVER TRUST COMPANY,

Third-Party Plaintiff,

-against-

BANKERS TRUST COMPANY, BANK LEUMI TRUST COMPANY OF NEW YORK, LONG ISLAND TRUST COMPANY, CHASE MANHATTAN BANK, N.A., CHEMICAL BANK, EUROPEAN AMERICAN BANK AND TRUST COMPANY, NATIONAL BANK OF NORTH AMERICA, WEST SIDE FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW YORK CITY, CITIBANK, N.A., THE BANK OF NEW YORK, THE FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of FRANKLIN NATIONAL BANK, JAMES BELTON and MARGARET BELSKY,

Third-Party Defendants.

BANKERS TRUST COMPANY,

Fourth-Party Plaintiff.

-against-

ELEANOR SIMON, Individually and ELEANOR SIMON, as Administratrix of the Estate of JEROME M. SIMON, deceased,

Fourth-Party Defendants.

CITIBANK, N.A.,

Fourth-Party Plaintiff.

-against-

BOWERY SAVINGS BANK,

Fourth-Party Defendant.

CHEMICAL BANK,
Fourth-Party Plaintiff,

-against-

EMIGRANT SAVINGS BANK,
Fourth-Party Defendant.

BANK LEUMI TRUST COMPANY OF NEW YORK,
Fourth-Party Plaintiff,

-against-

BARRISTER SHOE, INC.,
Fourth-Party Defendant.

NATIONAL BANK OF NORTH AMERICA,
Fourth-Party Plaintiff,

-against-

FRED SILVERMAN and LORE SILVERMAN,
Fourth-Party Defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Franklin National Bank,
Fourth-Party Plaintiff,

-against-

BARRISTER SHOE, INC.,
Fourth-Party Defendant.

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs,

-against-

BANKERS TRUST COMPANY,
Defendant.

Index No.: 7305/80

ACTION #2

BANKERS TRUST COMPANY,
Defendant and, Third-Party Plaintiff,

-against-

ELEANOR SIMON, Individually, and ELEANOR SIMON, as Administratrix of the Estate of JEROME M. SIMON, Deceased,
Third-Party Defendant.

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION,
Plaintiffs,

-against-

ELEANOR SIMON, Individually and as Administratrix of the Estate of JEROME M. SIMON, PHILIP SIMON and IRVING SIMON,
Defendants.

Index No.: 10529/80

ACTION #3

Supreme Court of the State of New York
COUNTY OF NEW YORK

RETAIL SHOE HEALTH COMMISSION, and JACK MALTZ, ALFRED WACHTEL, JULES ARRONSON and MELVIN KRAUSS, as Trustees of RETAIL SHOE HEALTH COMMISSION, *Plaintiffs,* *-against-* BARRISTER SHOE, INC. also known as FEMINETTE SHOE STORE, and BARRISTER SHOE CORP. *Defendants.*	**Index No.:** **ACTION #4**

[1]

In that consolidated action in Action #3 the Respondents Jack Maltz, Alfred Wachtel, Jules Arronson and Melvin Krauss and Retail Shoe Health Commission ("Retail Shoe") have sued the Estate of Jerome M. Simon for among other things "breach of the fiduciary duty said Jerome M. Simon owed to Retail Shoe".[2] Thus, Respondents have done just what they claim is prohibited by ERISA, i.e. bring a suit in state court raising issues of breach of fiduciary duty.

If, as Respondents suggest, claims (other than claim made by beneficiaries) which raise issues relating to breach of fiduciary duty must be brought in the federal court, then the Respondents' claims against the Estate of Simon must be brought in federal

1. New York unlike in the federal system does not require that a subrogated insuror be name as a real party in interest. Fed. R. Civ. Pro. 17; Civil Practice Law and Rules ("CPLR") 1004. However, there is little doubt as to the real or chief party in interest. The Aetna Casualty & Surety Company ("Aetna") and Respondent Retail Shoe have filed a claim against the Estate of Jerome M. Simon in the Surrogates Court, Kings County and Aetna's lawyers are prosecuting the action against the Estate of Simon in the New York Supreme Court.

2. The related state court action only recently came to the Petitioners attention. The Respondents did not advise the Petitioners that there were any other related proceedings. However, the third-party defendant actuary of Retail Shoe, Tolley International, in its brief to the New York Court of Appeals raised the issue that Retail Shoe had apparently by not proceeded against the Estate of Jerome Simon. The Respondents chose not to respond to this allegation.

court. However, there is nothing to indicate that Congress intended to federalize broad areas of state law dealing with subrogation, contributory and comparative negligence, the Uniform Contribution between Joint Tortfeasors Act, the Uniform Commercial Code, the "collateral source rule" and its exceptions as well as the New York Estates Powers and Trust Law, the New York Surrogates Court Procedure Act, New York common law doctrines, etc. *See, Sante Fee Industries* v. *Green*, 429 U.S. 814 (1970).

The available Congressional history makes clear that the purpose of Congress in preempting state laws under ERISA was to regulate the field of employee benefits. HR2, 93rd Cong. 2d Sess., 120 Cong. Rec. 29, 197 (Aug. 20, 1974). Congress intended to eliminate the threat of conflicting and inconsistent state and local regulation. *Id.* To achieve this purpose Congress followed to a large extent the approach it had taken in § 1243, the preemption provision of the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300 e-10. § 1243 of the Health Maintenance Organization Act of 1973 sought to promote health care by preempting restrictive state laws such as those which gave doctors control of the management of Health Maintenance Organizations. 1973 U.S. Code Cong. and Adm. News, pp. 305-60.

Thus, it was apparently in that context that Congress in August of 1974 discussed the preemption provisions of ERISA. Senator Taft inquired of Senator Javits whether state bar associations were preempted by ERISA from adopting and enforcing ethical rules or guidelines or disciplining member of the bar. Senator Javits responded that ERISA did not preempt bar associations from adopting or enforcing ethical rules or discipling members. However, bar associates were preempted from regulating legal service plans. Senator Williams opined that bar association rules which might affect the substance or operation of prepaid legal service plans were preempted and employers and unions under ERISA were free to develop and operate legal service plans. HR2 93rd Cong. 2d Sess. 120 Cong. Rec. 29,949 (Aug. 22,

1974). Congress never considered preemption in the context of a claim for contribution in a negligence action.

It is respectfully submitted the instant action is a simple negligence action in which an employer and/or its fidelity insuror seeks to recover allegedly defalcated funds. The fact that a welfare fund is the employer in this case is mere happenstance and should not be controlling for jurisdictional purposes. *See, e.g., Key Appliance Inc.* v. *National Bank of North America*, 75 App. Div. 2d, 428 N.Y.S.2d 238 (1st Dept. 1980) (an employee defalcation action involving the employer, employees, a bank, a bank employee and firm of certified public accountants); *Nat. Surety Corp.* v. *Lybrand*, 256 App. Div. 226, 9 N.Y.S.2d 54 (1st Dept. 1939) (an employee defalcation action in which the subrogated surety sued the employer's accountant); *Craig* v. *Anyon*, 212 App. Div. 55, 208 N.Y.S. 259 (1st Dept. 1925); (employer's action against auditor for employee's defalcations barred by employer's negligence); *see also* McLaughlin, Prac. Co., *McKinney's Cons. Laws of N.Y.*, 7B CPLR 1401:3, pp. 362-363; compare *Michota* v. *Anheuser-Busch*, Nos. 76-193, 77-2543 (D.N.J. Oct. 7, 1983) (an action by an employee involving an employer's duty to contribute to an employee benefit plan).

Finally, under the well pleaded complaint rule it appears that the instant action cannot be removed to federal court. *Franchise Tax Board* v. *Const. Laborers Vac. Trust*, _____ U.S. _____, 103 S. Ct. 2841 (1983). While Petitioners argued before the New York Court of Appeals that issues of breach of fiduciary duty were raised by the Respondents' complaint, the majority opinion of the Court of Appeals disagreed. As the majority and dissenting opinions also pointed out, there is no explicit federal jurisdictional basis for the Petitioners to bring civil claims in federal court alleging breach of fiduciary duty. ERISA § 502(a), 29 U.S.C. § 1132(a).

CONCLUSION

The petition should be granted and the opinion and decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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Dated: New York, New York
November 15, 1984